IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH : HYDERABAD

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WEDNESDAY, THE SECOND (2ND) DAY OF NOVEMBER,
TWO THOUSAND AND ELEVEN

Present:
HON'BLE SRI JUSTICE G.V.SEETHAPATHY

Second Appeal No.865 of 1997

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Between:

Pamarti Venkayamma

... Appellant

And:

Koppisetty Venkata Rathnam (Died) & 2 others

... Respondents

HON'BLE SRI JUSTICE G.V.SEETHAPATHY

Second Appeal No.865 of 1997

JUDGMENT:

This second appeal is directed against the judgment dated 28.04.1997 in AS No.112 of 1993 on the file of the IV Additional District Judge, East Godavari at Kakinada, wherein, the said appeal filed by the appellant herein, was dismissed, confirming the judgment and decree dated 23.09.1993 in OS No.158 of 1987 on the file of the Principal Subordinate Judge, Kakinada, wherein the suit filed by the respondent herein-plaintiff for specific performance of the suit agreement of sale dated 05.05.1984 was decreed.

2. Heard the learned counsel for the appellant and the learned counsel for the respondent. Perused the record.

3. The case of the respondent herein-plaintiff in brief is as follows:

The plaintiff's wife purchased 50 cents of land under an agreement of sale dated 05.05.1984 at the rate of Rs.50,000/- per acre from the defendant and paid an advance of Rs.1500/-. The plaintiff's wife was ready and willing to obtain the sale deed during her life time and subsequent to her death, the plaintiff was ready and willing to perform his part of the contract, but the defendant was postponing the same on some pretext or other. The plaintiff's wife got issued registered notice dated 29.01.1985 calling upon the defendant to execute a sale deed in terms of the agreement of sale. The defendant got issued a reply with false allegations. The plaintiff's wife died in February 1987. Thereafter the plaintiff, who became entitled to the assets of his wife Manga Devi, issued a registered notice dated 20.04.1987 calling upon the defendant to execute sale deed. As the defendant failed to comply with the demand, the plaintiff filed suit for specific performance.

4. The appellant/defendant filed written statement contending in brief as follows:

One Pithani Satyanarayana, who is related to the plaintiff and Abdul Mulla, who were working as Surveyors in government service, approached the defendant's husband offering to purchase part of the land belonging to the defendant for the purpose of house sites. They prepared a lay out and purchased some of the plots. Subsequently, they changed rough plan and included some more land for preparation of lay out. The plaintiff approached through Pitani Satyanarayana to purchase 50 cents of land in the name of his wife and the said Satyanarayana scribed the agreement where under, it was agreed to purchase 100 links width

of site with puntha on the eastern side and showed plot numbers 10 to 14 as per rough plan. When they brought the lay out plan, the plaintiff and his wife requested to execute sale deed for plot Nos.5 to 8 and 18 and from out of each 10 cents i.e., 484 sq. yards and out of it, 62 sq. yards has to be excluded towards road. In pursuance of the said agreement, four sale deeds were executed on 05.07.1984 in favour of the plaintiff's wife, Kandragula Subhadevi and Narala Rukhmini and it was also agreed that out of the advance sale consideration, an amount of Rs.300/- would be adjusted towards each sale deed and the balance sum of Rs.300/- remained to be adjusted towards sale consideration for the sale deed to be executed for plot No.18. The defendant was always ready and willing to execute sale deed for the remaining 10 cents. Hence, the claim of the plaintiff is devoid of merits.

5. On the strength of the pleadings, the following issues were settled for trial.

1. Whether the plaintiff is entitled for specific performance of the suit agreement of sale dated 05.05.1985 as claimed?

2. Whether the suit is not maintainable at law?

3. To what relief?

6. During the trial, PW.1 was examined and Exs.A.1 to A.7 were marked on behalf of the plaintiff. DWs.1 to 5 were examined and Exs.B.1 to B.7 were marked on behalf of the defendant.

7. On a consideration of the evidence available on record, the trial Court held that the defendant failed to establish plea of variation of contract and as the defendant admitted the execution of Ex.A.1 and also receipt of advance sale consideration, the plaintiff is entitled for specific performance of the agreement of

sale and the suit is maintainable. Accordingly, the suit was decreed directing the defendant to execute registered sale deed for the plaint schedule property of 50 cents. Aggrieved by the same, the defendant preferred an appeal in AS No.112 of 1993. By impugned judgment dated 28.04.1997, the learned Additional District Judge, dismissed the appeal and confirmed the judgment and decree of the trial Court. Hence, the present second appeal by the defendant.

8. Earlier, this Court by judgment dated 03.10.2007 allowed the second appeal in part and confirmed the decree passed by the trial Court to the extent of 10 cents, excluding the land covered by Exs.A.6 and B.5 to B.7. Aggrieved by the same, the plaintiff preferred Civil Appeal No.1165 of 2009 before the Supreme Court and by order dated 23.02.2009, the Hon'ble Supreme Court set aside the judgment of this Court and remitted the second appeal for deciding *de novo* on merits after framing substantial question of law.

9. In para 15 of the grounds of appeal, the appellant raised certain questions purporting to be substantial question of law and the purport of the said questions raised is that the courts below erred in holding that there is no specific plea in the written statement about the variation of contract and there has been misreading of the pleadings and the courts below failed to consider the relevant evidence pertaining to the variation of the contract and the courts below have erred in taking strict construction of pleadings. At the time of hearing, learned counsel for the appellant raised, additional substantial question of law to the effect that 'whether there is misreading and non-reading of evidence by the courts below regarding performance of contract for 40 cents of

land out of 50 cents of land by the appellant?'

10. Learned counsel for the appellant/defendant would mainly contend that the judgments of the courts below are vitiated by perversity in the matter of appreciation of the evidence pertaining to variation of contract and it gives raise to substantial question of law, notwithstanding the fact that the courts below have recorded concurrent findings. Learned counsel for the respondent/plaintiff on the other hand would contend that the entire evidence placed on record has been thoroughly considered by the courts below and the same was re-appreciated by the appellate Court and on such proper appreciation of the evidence, the courts below have recorded concurrent findings on questions of fact, which do not project any question of law, muchless, substantial question of law and the defendant having failed to plead and prove the alleged variation of contract cannot be permitted to brand the concurrent judgments of the courts below as perverse for the sake of getting the matter within the ambit of section 100 CPC and projecting as if there is substantial question of law to be considered.

11. In view of the rival contentions advanced by both sides, the question that arises for consideration is whether concurrent findings recorded by the courts below are vitiated on account of any perversity in the matter of considering pleadings or appreciation of the evidence that gives raise to a substantial question of law and warrants interference by this Court under Section 100 CPC?

12. The case of the plaintiff is simple and specific. According to him, his wife Mangadevi entered into an agreement of sale Ex.A.1 for purchase of 50 cents of land in Sy.Nos.174/4 and 174/5 out of total extent of Ac.6.89 cents as described in the plaint

schedule, from the defendant for a consideration of Rs.50,000/- per acre and paid an advance of Rs.1500/- on the date of the agreement and inspite of demands and issuing registered notices, defendant failed to execute the sale deed. The defendant categorically admits the execution of Ex.A.1 agreement of sale and the terms thereof and also factum of receipt of advance of Rs.1500/-. She however, contends that one Pithani Satyanarayana, relative of the plaintiff and Abdul Mulla, who were government surveyors, approached the defendant's husband and prepared rough plan and the land covered by Ex.A.1 was shown as plots 10 to 14 in the said plan and subsequently, they changed the plan while leaving 62 sq. yards from each plot of 10 cents towards formation of roads and in the course of such realignment, the land covered by Ex.A.1 came to be shown as plots 5 to 8 and 18 in the proposed lay out Ex.B.3 and the defendant executed four sale deeds Exs.A.6 and B.5 to B.7 on 05.07.1984 in respect of 4 plots of 10 cents each and Ex.A.6 was in favour of none else than the plaintiff's wife and the advance amount of Rs.1500/- was also adjusted equally at the rate of Rs.300/- for each sale deed and the defendant is liable to execute only one more sale deed for the remaining extent of 10 cents after adjusting remaining balance advance amount of Rs.300/- and that she is prepared to execute the said sale deed. At the time of the evidence, the defendant has produced Ex.B.1 dated 12.10.1986 purporting to be a letter of understanding between the plaintiff and defendant incorporating the terms of the variation of the original contract. The plaintiff categorically denied execution of any such document under Ex.B.1 and contended that it was a false and fabricated document brought into existence subsequent to filing of the written statement.

13. From the pleadings and evidence it is clear that the defendant has admitted execution of original agreement Ex.A.1 in favour of the plaintiff's wife and the terms thereof where under she agreed to sell 50 cents of land at the rate of Rs.50,000/- per acre. Ex.A.1 does not make any reference to any rough plan or lay out plan. When the defendant seeks to contend that there has been variation in the terms of the contract and the same was reduced into writing under Ex.B.1 and in pursuance thereof, she executed four sale deeds out of five sale deeds, the burden of proving the said plea regarding variation in the terms of the contract squarely lies on the defendant. The variation in the terms of the original contract alleged by the defendant is not peripheral or cosmetic but is substantial virtually altering the nature and complexion of the original contract Ex.A.1 and touching upon the material aspects including the location of the land itself. The burden therefore heavily lies on the derendant to plead and establish by cogent and reliable evidence that there has in fact been a variation in the original contract and such varied terms were agreed to by the plaintiff and in accordance with such mutual agreement Ex.B.1 came to be executed.

14. It is significant to note that either in the reply notice Ex.A.3 or in the written statement, there is no reference to the execution of Ex.B.1. No doubt in Ex.A.3 and also written statement, the defendant alleged that subsequent to the original agreement, she sold the land under four sale deeds for 10 cents each and she is liable to execute only one more sale deed for the remaining 10 cents. When according to the defendant, subsequent variation in the terms of the original agreement Ex.A.1 was reduced into writing under Ex.B.1 on consent by both parties, there

is absolutely no reason or explanation as to why the same has not been referred to in Ex.A.3 reply notice or written statement. The said document Ex.B.1 is also not filed along with the written statement, nor mentioned in the list of documents appended to the written statement. The said circumstance supports the contention of the plaintiff that Ex.B.1 was brought into existence subsequent to filing of the written statement. The plaintiff categorically denied the truth of execution of Ex.B.1 and disputed the genuineness of the signature on Ex.B.1. The defendant has not adduced any reliable evidence to prove the genuineness of Ex.B.1 and the contents thereof. The defendant who is a party to the said document Ex.B.1 has not chosen to give evidence at all and for no stated reasons. None of the attestors of Ex.B.1 is examined. The scribe of Ex.B.1 is examined as DW.3 and his evidence was found to be unreliable by the courts below on the ground of his interestedness he being a tenant of the defendant and also inconsistency of other evidence on record. The defendant has not taken any steps before the trial Court to send the document Ex.B.1 to any handwriting expert for comparison and opinion regarding the genuineness or otherwise of the signature of the plaintiff. According to the plaintiff, he always subscribes his signature in English and the signature appearing in Telugu on Ex.B.1 does not belong to him. Ex.B.1 contains two signatures of the plaintiff, one below the other and as rightly pointed out by the courts below, they both are in total variance with each other. The document Ex.B.1 and the signatures thereon are in different inks throwing any amount of suspicion over the genuineness of the document. On proper appreciation of the evidence on record, the courts below have recorded concurrent findings on a question of fact that the defendant has miserably failed to establish the genuineness of

Ex.B.1.

15. Learned counsel for the appellant would contend that though in the written statement, no specific plea is raised regarding Ex.B.1, the purport of the entire written statement is to the effect that there has been variation in the terms of the original agreement Ex.A.1 and accordingly four sale deeds were executed for an extent of 10 cents each, expressing willingness to execute the sale deed for the balance 10 cents and therefore, it cannot be said that there was no pleading regarding variance of the contract. No doubt, the defendant pleaded in the written statement that she executed four sale deeds for 10 cents each in view of the change of plots in the revised plan and with the consent of the plaintiff. The fact, however, remains that the written statement is totally silent about the execution of Ex.B.1, which according to the defendant, reflected variance in the terms of the original contract. The findings of the courts below that there has been no specific plea in the written statement about the execution of Ex.B.1 cannot therefore be found fault with. The absence of any reference to Ex.B.1 in the written statement certainly impinges on the veracity of the version of the defendant and strengthens the contention of the plaintiff that Ex.B.1 was brought into existence subsequently. Any amount of evidence pertaining to Ex.B.1 without there being a plea is of no avail. In fact, the courts below have found that the evidence adduced to prove Ex.B.1 is too scanty and shabby to be believed and acted upon. The said concurrent findings recorded on proper appreciation of the evidence available on record cannot be called as perverse so as to bring the matter within the ambit of section 100 CPC.

16. Learned counsel for the respondent relied upon the

decision in '***Ravinder Singh v. Janmeja Singh***[1]' wherein the apex Court held that 'no evidence can be led on a plea not raised in the pleadings and no amount of evidence can cure defect in the pleadings.'

17. Learned counsel for the appellant seeks to lay emphasis on the fact that after issuance of Ex.A.3 reply notice, plaintiff's wife, who was alive at that time, did not issue any rejoinder disputing execution of the sale deeds Exs.A.6, B.5 to B.7 or denying the varied terms of the original contract. Ex.A.3 notice was issued in reply to Ex.A.2 notice dated 29.01.1985 by the defendant to the plaintiff. In Ex.A.3 also, there is no reference to Ex.B.1 or to the number of plots or that there was any change in the plot numbers or their location. There is also no reference to any rough plan or subsequent fair plan in Ex.A.3. It is also not stated in Ex.A.3 that original plot numbers 10 to 14 as per the rough plan got changed to plot Nos.5 to 8 and 18 in the fair plan because of deduction of 62 sq. yards for formation of the road from each plot. On the other hand, in Ex.A.3 after referring to the original agreement Ex.A.1, the defendant stated that as per the said agreement, the defendant executed four sale deeds for 10 cents each as desired by the plaintiff's wife. Even the sale deed Ex.A.6 executed by the defendant in favour of the plaintiff's wife in respect of the plot No.5, does not make any reference to Ex.A.1 agreement or rough plan or any change of the said plan. Ex.A.6 and Exs.B.5 to B.7 are the sale deeds, executed by the defendant in favour of the plaintiff's wife and three others, which show that plot Nos.5 to 8, were sold by the defendant in Sy.No.174/5. There is nothing on record to establish that the said plots together with Plot No.18 corresponding to the original Plot Nos.10 to 14.

Admittedly, there is variance in the extent and also the location between the original plots 10 to 14 and the changed plots 5 to 8 and 18. It is therefore, not a case where the same plots of land, which were originally assigned plot Nos.10 to 14, were assigned new Plot Nos.5 to 8 and 18. With the variance in the extent and also location of the plots, it cannot be contended that there was only a change in the number assigned to the plot and nothing more. Original agreement Ex.A.1 does not refer to any plot numbers at all in the schedule and it is in respect of 50 cents of land. Neither Pithani Satyanarayana and Abdul Mulla, surveyors, who are said to have prepared original rough plan and subsequent fair plan are not examined to establish that the same land referred to in Ex.A.1 was laid in to five plots with Plot Nos.10 to 14 and the same land on account of deduction of 62 sq. yards from each plot towards formation of road came to be assigned new plot numbers 5 to 8 and 18. The defendant has therefore failed to establish that the plots sold under Ex.A.6 and B.5 to B.7 formed part of the land of 50 cents agreed to be sold under Ex.A.1.

18. According to the defendant substantial part of the agreement Ex.A.1 has been performed with execution of Ex.A.6, B.5 to B.7 and only one sale deed for an extent of 10 cents remains to be executed. The said contention cannot be upheld. The defendant failed to establish that the land covered by the plots sold under Ex.A.6 and B.5 to B.7 formed part of the land of 50 cents agreed to be sold under Ex.A.1. Under those circumstances, simply because the plaintiff's wife during her life time failed to give any further reply by way of rejoinder to the reply notice Ex.A.3 issued by the defendant, no inference of acquiescence with the contents of Ex.A.3 can be assigned. In fact, after the death of his wife, the plaintiff issued further notice under Ex.A.4 dated

20.04.1987 where under he referred to the earlier exchange of notices Exs.A.2 and A.3 and stated that the contents of Ex.A.3 reply notice are false and reiterated the demand for specific performance based on Ex.A.1. In fact, in Ex.A.4, the plaintiff has stated that his wife got issued further reply on 03.03.1985 refuting the contentions of Ex.A.3. Of course, copy of the said notice has not been filed before the Court. Ex.A.4 was also returned un-served under Ex.A.5. None of the purchasers under Exs.B.5 to B.7 are examined to show that their purchases were relatable to Ex.A.1.

19. Be that as it may, failure of defendant to raise a specific plea based on Ex.B.1 in the written statement is also strong probability that arises against the contention of the defendant. When once, the defendant has admitted execution of the suit agreement of sale Ex.A.1 and its terms and contended that there has been variance in the terms of the contract and substantial portion of the contract has been performed as per varied terms, the burden lies heavily on the defendant to establish the said contention. But in the present case, she miserably failed to do so. When such is the situation, concurrent findings on a question of fact, recorded by the courts below on due appreciation of the evidence on record do not call for any interference.

20. A perusal of the impugned judgment would disclose that the trial Court has considered all relevant and material evidence placed on record while recording its findings and the appellate Court on reappraisal of the said evidence in a proper way, rightly confirmed the findings of the trial Court. It is not a case where any relevant or material evidence is left out of consideration nor any irrelevant and inadmissible evidence is taken into account. The

contention of the learned counsel for the appellant/defendant that there has been misreading of the pleadings or improper appreciation of the evidence by the courts below that led to recording of perverse findings is untenable. It is a case where the defendant has failed to discharge the burden of establishing the contentions raised by her regarding variance of the original terms of the contract and the alleged performance of the original contract substantially in accordance with the varied terms.

21. Learned counsel for the appellant relied upon the decision in '***Abdul Raheem v. Karnataka Electricity Board***[2], wherein it was held that 'there cannot be any doubt whatsoever that consideration of irrelevant fact and non-consideration of relevant fact would give rise to a substantial question of law'. The proposition laid in the above decision is not disputed.

22. In the above decision, a reference is made to the decision in '***Iswar Bahi C. Patel @ Bachu Bhai Patel v. Harihar Behera***[3], wherein it was held that 'the findings of fact concurrently recorded by the trial court as also by the lower appellate court could not have been legally upset by the High Court in a second appeal under Section 100 CPC unless it was shown that the findings were perverse, being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion."

23. In the present case, it cannot be said that the findings are based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion and so they are perverse.

24. For the same reason, the decision in '***Bharatha Matha v. R.Vijaya Renganathan***[4], relied upon by the learned counsel for the appellant is also not applicable and the principle laid down therein that the High Court can interfere with the findings of fact while deciding the second appeal provided the findings recorded by courts below are perverse, cannot be disputed.

25. Learned counsel for the appellant relied upon the decision in '***Madan Lal v. Mst. Gopi***[5], wherein the apex Court held as follows:

> "….Though whether a person was in a fit state of mind to execute the adoption is a question of fact, where both courts below ignored the weight of preponderating circumstances and allowed their judgments to be influenced by inconsequential matters, the High Court would be justified in re-appreciating the evidence and in coming to its won independent conclusions."

26. The above decision is also not applicable as the courts below have recorded concurrent findings based on the relevant material evidence on record but not by taking into consideration of the irrelevant and inconsequential matters.

27. Learned counsel for the appellant also relied upon the decision in '***Ishwar Dass Jain v. Sohan Lal***[6], wherein the apex Court held that 'the question whether the courts below are justified in failing to rely on vital pieces of evidence but relying on inadmissible evidence is a substantial question of law on which High Court can entertain a second appeal'.

28. In '***Thiagarajan v. Sri Venugopalaswamy B. Koil***[7]', the

Apex Court held as follows:

> "…..The High Court in its jurisdiction under Section 100 CPC was not justified in interfering with the findings of fact. The court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on re-appreciation of evidence merely on the ground that another view was possible. In the same case, this court observed that in a case where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower appellate Court. This Court observed that to say the least the approach of the High Court was not proper. This Court further observed that the High Court in second appeal cannot substitute its own findings on re-appreciation of evidence merely on the ground that another view was possible."

29. In '***Roop Singh v. Ram Singh***[8]' the apex Court held as follows:

> "It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law land it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under section 100 CPC."

30. In '***Madhavan Nair v. Bhaskar Pillai***[9]', the Apex Court observed that 'the High Court was not justified in interfering with the concurrent findings of fact'. It was further observed that 'it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same'.

31. In '***H.P.Pyarejan v. Dasappa***[10]', the Apex Court found serious infirmity in the judgment of the High Court and observed that 'it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 CPC (as amended in 1976) the jurisdiction of the Court to interfere with the judgments of the Courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes re-appreciation of evidence'.

32. In the circumstances and in the light of the principles laid down in the above decisions, it must be held that no question of law muchless substantial question of law arises out of the concurrent findings recorded by the courts below on the question of fact and the said findings which are based on proper appreciation of the evidence by the courts below cannot be termed perverse so as to warrant interference by this Court under section 100 CPC. The questions which are raised in the grounds of appeal and the additional question raised at the time of hearing by the appellant do not infact throw up any substantial question of law to be considered under section 100 CPC.

33. In the result, the second appeal is dismissed. No order as to costs.

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G.V.SEETHAPATHY, J

Date: 02.11.2011
bss

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[1] (2008) 8 SCC 191

[2] AIR 2008 SC 956

[3] (1999)3 SCC 457

[4] 2010(5) ALT 4 (SC)

[5] AIR 1980 SC 1754(1)

[6] 2000(1) ALD 40 (SC)

[7] (2004) 5 SCC 762

[8] (2000)3 SCC 708

[9] (2005) 10 SCC 553

[10] (2006) 2 SCC 496